

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

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| MIF CITY II, LP | : | |
| Plaintiff/Counterclaim Defendant | : | |
| | : | |
| v. | : | No. 2:18-cv-03302-CFK |
| | : | |
| CALIFORNIA PIZZA KITCHEN, INC. | : | |
| Defendant/Counterclaim Plaintiff | : | |
| | : | |
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PRETRIAL MEMORANDUM OF CALIFORNIA PIZZA KITCHEN, INC.

Plaintiff Defendant/Counterclaim Plaintiff, California Pizza Kitchen, Inc. (“CPK”), by and through its counsel, Margolis Edelstein, and pursuant to Local Rule of Civil Procedure 16.1(c), hereby submits its Pretrial Memorandum.

I. BRIEF STATEMENT OF THE NATURE OF CASE AND JURISDICTION

This breach of contract action arises from a lease agreement between CPK and its landlord, MIF City II, L.P. (hereinafter “MIF”), and the parties’ respective contractual obligations relating to certain plumbing and roof leaks at a shopping center located at 4040 City Avenue in Philadelphia. MIF alleges breach of contract associated with certain plumbing leaks into the tenant space located below the CPK restaurant. CPK denies responsibility for said plumbing issues and itself alleges breach of contract against MIF regarding the plumbing issues, given the responsibilities of the landlord, MIF, under the lease as to plumbing and subsidence issues. CPK also alleges that MIF breached its contractual obligations as to maintenance of the building’s roof, which is leaking water into the CPK restaurant.

The basis for jurisdiction is diversity jurisdiction because the parties are citizens of different states and the amount in controversy exceeds \$75,000.00.

II. BRIEF STATEMENT OF FACTS

MIF is the owner of a multi-tenant real estate and shopping center located at 4040 City Avenue, Philadelphia, PA 19131. The parties entered into a written lease agreement dated January 31, 2007 whereby CPK, as tenant, leased a unit within the shopping center from MIF, as landlord, for the purposes of operating a California Pizza Kitchen restaurant.

The shopping center is a two-story building containing a total of three units. The CPK Premises occupies one unit on the upper floor, a Chipotle Restaurant occupies the adjacent unit. The third unit, on the lower floor, was formerly occupied by a Potbelly Sandwich restaurant, and is currently occupied by a restaurant called DJ Kitchen. Pursuant to the lease, CPK installed some portion of the drainage piping serving its restaurant, while other portions of the drainage piping were MIF's responsibility as the landlord.

MIF alleges that CPK failed to properly install, maintain and/or repair its portion of the drainage piping and that there were repeated leaks into the below tenant space as a result. MIF is seeking reimbursement for past and future lost rental income, among other damages.

CPK denies that it caused any of the leaks or other plumbing issues complained of in the Complaint, and denies that MIF is entitled to any recovery from CPK. It is CPK's position that the issues complained of by MIF are a result of MIF's own breaches of contract and failure to properly maintain the premises. CPK alleges that MIF failed to address, among other things, property settlement which impacted the piping, including damaging portions of the plumbing system for which MIF was responsible and which in turn impacted the pipes within the building. Due to its failures in its contractual obligations, MIF ended up damaging the plumbing systems serving property, including the plumbing lines serving CPK's space, and even caused a sanitary sewer main line break, resulting in water infiltration throughout the building. CPK further alleges that

the downstairs tenants experienced leaks not just from areas that would be below the CPK restaurant, but also below MIF's other second floor tenant, Chipotle, further evidencing that CPK is not the cause of the problems. CPK will introduce expert testimony at trial rebutting MIF's claims as to causation and establishing that MIF failed in its duties under the lease. CPK has asserted a counterclaim arising from the harm it suffered due to MIF's failure to properly maintain the premises, forcing CPK to incur thousands of dollars in expenses in addressing plumbing issues over the years. CPK's counterclaim also seeks damages arising from MIF's failure to properly remediate the chronic roof leaks at the property.

III. DAMAGES

CPK denies that it is in any way liable for any damages allegedly incurred by MIF. Further, the Court has entered an Order partially granting CPK's motion for summary judgment, dismissing all claims by MIF for damages prior to August, 2014, i.e., four years prior to the filing of MIF's complaint. Further still, MIF's alleged damages are unsupportable. Additionally, MIF relies upon lease terms which are inapplicable to the issues at hand. CPK has suffered damages including costs of repairs/plumbing which were MIF's responsibility to fix, and cost of roof-leak related repairs, of \$41,000.00, plus attorneys fees and other litigation expenses.

IV. WITNESS LIST FOR CPK'S CASE IN CHIEF

1. Gene Davis, Construction and Facilities Manager, c/o CPK's counsel. Liability and damages.
2. Armando Chiclla, General Manager of CPK location at City Avenue, c/o CPK's counsel. Liability and damages.
3. David O'Barr, VP of Real Estate, c/o CPK's counsel. Liability and damages.

4. E. Mitchell Swann, PE; MDC Systems, 37 North Valley Rd , 3 Station Sq., Ste. 100 · Paoli, PA 19301. Expert witness for CPK. Liability.
5. Julian Toneatto, PE, Ph.D; MDC Systems, 37 North Valley Rd , 3 Station Sq., Ste. 100 · Paoli, PA 19301. Expert witness for CPK. Liability.
6. Allyson J. Lynch O'Malley; Frank Merenda; EAC Valuations; 1500 Lancaster Avenue, Paoli, PA 1931. Expert witness for CPK. Damages.
7. Marc Feyh, Vice President, Henderson Engineers, Inc., 8325 Lenexa Drive, Lenexa, KS 66214. 913-742-5348. Liability.
8. David C. Hofmeister, Bala Engineering. 443 South Gulph Road, King of Prussia, PA 19406. Liability.
9. Jerry Batoff, c/o MIF's counsel. Liability and damages.
10. Todd Pilgrim, c/o MIF's counsel. Liability and damages
11. Marlin Jones, MJ Contracting LLC. 1333 Sanatoga Rd., Pottstown, PA 19464. Liability.
12. Representative of Tinneney Plumbing and Heating, Inc., 404 Fountain Street, Philadelphia, PA 19128. 215-487-3113. Damages.
13. Representative of Zoom Drain, 915 S. Trooper Rd., Norristown, PA 19403. 610-650-0555. Liability and Damages.
14. Representative of K.E. Seifert, 155 N. Green Street, Langhorne, PA 19047. Liability and Damages.
15. Representative of A. HoneyDipper Septic Service J. Brehm Inc., P.O. Box 427, Douglasville, PA 19518, 610-327-1699. Liability and Damages.
16. Niko Zhao, DJ Kitchen, 4030 City Ave., Philadelphia, PA 19131. Liability and damages.
17. Courtney Lindley or other representative, Potbelly Sandwich Shop. Liability and damages.

18. Amy Garriss, 9818 Mahogany Dr., 104, Gaithersburg, MD. Liability.
19. Any and all witnesses which may be necessary for the purposes of rebuttal or impeachment.
20. Any and all witnesses identified in MIF's witness list.
21. Any and all witnesses identified in discovery responses.
22. Any and all witnesses identified in document production.
23. This list is not intended to be all-inclusive. Rather, it is intended to represent the witnesses whom CPK intends to call in its case in chief at trial. CPK reserves the right to supplement this list, and reserves the right to call additional witnesses for the purposes of rebuttal and impeachment.

V. EXHIBITS

See attached list—Appendix A.

VI. ESTIMATED TRIAL LENGTH

Five days.

VII. SPECIAL ISSUES

Please note that by Order dated August 6, 2019, the Court granted CPK's motion for summary judgment on the statute of limitations in part, as to all alleged damages and occurrences before August 3, 2014.

Please also note that CPK is filing on this date a number of Motions in Limine, including as to the admissibility of expert testimony and lay opinion testimony, which are incorporated by reference herein as if set forth in full. CPK is also submitting a motion for bifurcation of trial.

As the parties are exchanging their witnesses lists simultaneously, the parties will work to discuss objections and potential stipulations as to exhibits in advance of trial, along with considerations regarding deposition designations.

Respectfully submitted,

MARGOLIS EDELSTEIN

Date: August 9, 2019

/s/ Mohammad A. Ghiasuddin

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*Counsel for Defendant/Counterclaim Plaintiff,
California Pizza Kitchen, Inc.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 9, 2019, a true and correct copy of California Pizza Kitchen, Inc.'s Pretrial Memorandum was caused to be filed via the Court's Electronic Filing system whereby this filing was also caused to be served upon the following via ECF filing:

Barry L. Cohen, Esq.
Joshua Upin, Esq.
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Philadelphia, PA 19103
Counsel for Plaintiff/Counterclaim Defendant
MIF City II, LP

MARGOLIS EDELSTEIN

Date: August 9, 2019

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